



**THE ATTORNEY GENERAL  
OF TEXAS**

**AUSTIN, TEXAS 78711**

**CRAWFORD C. MARTIN  
ATTORNEY GENERAL**

June 6, 1972

Honorable James U. Cross  
Executive Director  
Texas Parks & Wildlife Department  
John H. Reagan Building  
Austin, Texas 78701

Opinion No. M-1146

Re: Whether a Commissioner on the Texas Parks and Wildlife Board may simultaneously serve on the board of an independent school district.

Dear Mr. Cross:

Your request for an opinion on the above subject matter reads in part as follows:

"One of our Commissioners was on the Board of an Independent School District prior to his appointment as a Parks and Wildlife Commissioner. He is still serving on such School Board in the same term in which he was serving when appointed to the Parks and Wildlife Commission.

"He has received no pay, expenses, per diem, or compensation of any kind from either of said positions, and this matter is not in litigation.

"Is this Commissioner legally serving on the Parks and Wildlife Commission? If not, why not? If he can serve, are there any special conditions attached to such service?"

Section 40 of Article XVI, Constitution of Texas, prohibits the holding of more than one civil office of emolument.

Prior to the 1967 amendment, Section 33 of Article XVI of the Constitution of Texas provided in part:

"The Accounting Officers of this State shall neither draw nor pay a warrant upon the Treasury in favor of any person, for salary or compensation as agent, officer or appointee, who holds at the same time any other office or position of honor, trust or profit, under this State, or the United States, except as prescribed in this Constitution.

The 1967 amendment to Section 33 of Article XVI added the following provision:

"It is further provided, until September 1, 1969, and thereafter only if authorized by the Legislature by general law under such restrictions and limitations as the Legislature may prescribe, that a non-elective State officer or employee may hold other non-elective offices or positions of honor, trust, or profit under this State or the United States, if the other offices or positions are of benefit to the State of Texas or are required by State or federal law, and there is no conflict with the original office or position for which he receives salary or compensation. No member of the Legislature of this State may hold any other office or position of profit under this state, or the United States."

Pursuant to the 1967 amendment, Article 6252-9a, Vernon's Civil Statutes, was enacted stating the conditions under which a nonelective State officer may hold other nonelective offices.

In Attorney General's Opinion M-409 (1969) it was pointed out:

"In determining what constitutes an office, within the meaning of a constitutional provision, this office has frequently applied the criteria set forth in Barney v. Hawkins, 79 Mont. 506, 257 P. 411, 53 A.L.R. 583 (1927), to wit:

"After an exhaustive examination of the authorities, we hold that five elements are indispensable in any position of public employment, in order to make it a public office of a civil nature: (1) It must be created by the Constitution or by the Legislature or created by a municipality or other body through authority conferred by the Legislature; (2) It must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) The powers conferred, and the duties to be discharged, must be defined, directly or impliedly, by the Legislature or through legislative authority; (4) The duties must be performed independently and without control of a superior power, other than the law, unless they be

those of an inferior or subordinate office, created or authorized by the Legislature, and by it placed under the general control of a superior officer or body; (5) It must have some permanency and continuity, and not be only temporary or occasional.'"

Under the foregoing test membership on the Parks and Wildlife Commission constitutes a nonelective office. Article 6067, Vernon's Civil Statutes. On the other hand, the office of trustee of an independent school district is an elective office. Section 23.08, Texas Education Code. The office of trustee of an independent school district, however, is not an "office of emolument" within the meaning of Section 40 of Article XVI of the Constitution of Texas. Thomas v. Abernathy County Line Independent School Dist., 278 S.W. 312 (Tex.Civ.App. 1925, rev. on other grounds, 290 S.W. 152). It is noted that on appeal the Commission of Appeals of Texas held the offices of school trustee and alderman incompatible and stated that ". . . whether the office of school trustee . . . is an office of 'emolument' within the terms of section 40, art. 16, of the Constitution, is immaterial, and in respect to that question we do not express or imply a conclusion." (At p. 153).

In view of the foregoing, a Commissioner on the Parks and Wildlife Commission may at the same time hold the office of trustee of an independent school district. However, the Comptroller of Public Accounts may not issue him a warrant in payment of the compensation provided for in Item 1 of the appropriation to the Parks and Wildlife Department contained in the current General Appropriations Act (p. III-105, 3604), since the 1967 amendment of Section 33 of Article XVI does not exempt from its provisions an elective office. Boyett v. Calvert, 467 S.W.2d 205 (Tex.Civ.App. 1971, error ref. n.r.e.); Attorney General's Opinion No. M-193 (1968).

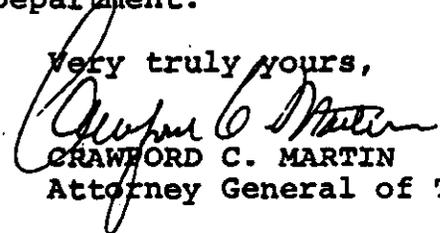
#### S U M M A R Y

An individual may hold at the same time the nonelective office of Commissioner on the Parks and Wildlife Commission and the elective office of trustee of an independent school district since the office of trustee is not an office of emolument within the meaning of Section 40 of Article XVI, Texas Constitution. Section 33, Article XVI, of the Constitution of Texas, however, prohibits the Comptroller of Public Accounts from issuing to the

Hon. James U. Cross, page 4 (M-1146)

Commissioner any warrant in payment of the compensation provided in Item 1 of the appropriation to the Parks and Wildlife Department.

Very truly yours,

  
CRAWFORD C. MARTIN  
Attorney General of Texas

Prepared by John Reeves  
Assistant Attorney General

APPROVED:  
OPINION COMMITTEE

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